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9 UNITED STATES DISTRICT COURT  
10 SOUTHERN DISTRICT OF CALIFORNIA

11  
12 NORTH AMERICAN COMPANY FOR  
LIFE AND HEALTH INSURANCE,

13 Plaintiff,

14 vs.

15 MICHAEL L. PHILPOT, an individual,  
16 VIRGINIA B. HIRSH, an individual,  
JOHN B. KUYKENDALL, an individual,  
17 RENE ALEJANDRO LACAPE, an  
individual, C. RICHIE MCNAMEE, an  
18 individual and HECTOR PAEZ VALDEZ,  
an individual,

19 Defendants.  
20

No.: 08 CV 0270 BEN NLS

**PLAINTIFF'S MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
OPPOSITION TO DEFENDANT  
MICHAEL L. PHILPOT'S MOTION  
TO DISMISS [F.R.C.P. 12(b)(6)]  
AND MOTION FOR A MORE  
DEFINITE STATEMENT [F.R.C.P.  
12(e)]**

Date: July 21, 2008  
Time: 10:00 a.m.  
Courtroom: 3

Complaint Filed: February 13, 2008  
Trial Date: None Set

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## I.

INTRODUCTION

In his Motion to Dismiss plaintiff North American Company for Life and Health Insurance's ("North American") claims against him, defendant Michael Philpot ("Philpot") does not dispute that he engaged in the conduct North American described in the complaint. Instead, he argues that his conduct is legal because commission rebating is legal in California. However, the sole issue to be decided on this Motion is the sufficiency of the allegations in North American's complaint, which plainly and properly alleges conduct by Philpot and his confederates that is far more than simple commission rebating. The allegations of the complaint easily support claims for unfair competition, breach of contract, bad faith, fraud, negligence, unjust enrichment, violation of RICO, declaratory relief and accounting.

North American's allegations, generally stated, are as follows:

North American contracted with Philpot and the other defendants to sell life insurance products to customers with a legitimate interest in the products and a desire to provide life insurance protection for their beneficiaries. Instead, from at least 2004 through May 2007, Philpot and his cohorts, using the Michael Philpot agency as a vehicle, instead breached their contracts with North American by participating in an illegal and fraudulent scheme solely designed to extract upfront commission and bonus payments from North American. The scheme involved Philpot and his agents inducing individuals to apply for life insurance policies by making secret payments and/or paying the policy premiums for such policies ("Sham Policies") when they knew full well that the "policyholders" had no good faith intention to maintain their policies. Defendants hid their activities from North American and fraudulently induced North American to pay them commissions by leading it to believe that these were genuine life insurance transactions in which policyholders were paying their own money for their own life insurance needs. In fact, defendants' scheme was designed

1 solely to generate commissions through this secret scheme, and none of their “clients”  
2 had an intent to maintain the policies. Simply put, the policyholders were merely a  
3 vehicle for the agents’ scheme to take money from North American on false pretenses.

4 North American, to its substantial financial detriment, issued the Sham Policies  
5 and paid Philpot and other agents in the Michael Philpot agency tens of millions of  
6 dollars in sales commissions and unearned bonuses. The Sham Policies then lapsed as  
7 Philpot intended, well after he and his cohorts had deceived North American into  
8 paying the maximum amount of commissions.

9 Philpot’s conduct, referred to as the “Illegal Commission Scheme” in the  
10 complaint, is clearly actionable, notwithstanding Philpot’s assertions regarding the  
11 legality of commission rebating. Philpot cannot avoid the consequences of his  
12 malfeasance simply by calling it legal commission rebating because that practice is  
13 categorically different from the wrongdoing North American alleges he perpetrated by  
14 way of the Illegal Commission Scheme.

15 Moreover, Philpot’s attempt to use Proposition 103 as a shield also fails  
16 because Proposition 103 clearly was not intended to protect rogue insurance agents  
17 who have engaged in improper sales schemes and who have conspired to have life  
18 insurance policies issued in direct contravention of the terms of their agreements with  
19 North American.<sup>1</sup> In any event, Proposition 103 does not prohibit contracting parties  
20 from agreeing to refrain from rebating as Philpot expressly agreed to do.  
21 Furthermore, because North American’s claims are all based upon well-pleaded  
22 allegations of Philpot’s malfeasance, Philpot’s argument that there is no underlying  
23 wrong to support these claims also must fail. Lastly, because North American’s  
24 complaint alleges definite and unambiguous claims on its face, the Court should reject  
25 Philpot’s alternative motion for a more definite statement under Rule 12(e).

26 <sup>1</sup> It should also be noted that Proposition 103 contains no language that mandates its  
27 application to life insurance and that Philpot’s position is neither supported by any  
28 applicable case law nor an objective reading of the proposition.



1 Because North American has properly alleged facts sufficient to state all of its  
 2 claims, and because Philpot utterly fails to establish any legal basis for dismissal of  
 3 these claims, his Motion should be denied.<sup>2</sup>

## 4 II.

### 5 LEGAL ARGUMENT

#### 7 A. Standard Governing Motions to Dismiss.

8 In reviewing a 12(b)(6) motion to dismiss, the court must accept as true all  
 9 material allegations in the complaint, as well as reasonable inferences to be drawn  
 10 from them. *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998); *see also*  
 11 *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S.  
 12 163, 164 (1993); *United States v. White*, 893 F. Supp. 1423, 1428 (C.D. Cal. 1995).  
 13 The court should not dismiss a claim under Rule 12(b)(6) unless “it appears beyond  
 14 doubt that the plaintiff can prove no set of facts in support of his claim which would  
 15 entitle him to relief.” *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 811 (1993);  
 16 *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 984 (9th Cir. 2000).

17 Moreover, “[a] motion to dismiss for failure to state a claim is viewed with  
 18 disfavor and is rarely granted.” *Gilligan v. Jamco Develop. Corp.*, 108 F.3d 246, 249  
 19 (9th Cir. 1997) (the federal notice pleading standard establishes “a powerful  
 20 presumption against rejecting pleadings for failure to state a claim.”). A Rule 12(b)(6)  
 21 dismissal is proper only where there is either a “lack of a cognizable legal theory” or  
 22 “the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v.*  
 23 *Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990); *United States v. Redwood*  
 24 *City*, 640 F.2d 963, 966 (9th Cir. 1981) (a 12(b)(6) dismissal is proper only in  
 25 “extraordinary” cases); *Graehling v. Village of Lombard, Ill.*, 58 F.3d 295, 297 (7th

26  
 27 <sup>2</sup> Defendants Rene Alejandro Lacape and Virginia B. Hirsch have filed joinders to  
 28 Philpot’s Motion to Dismiss thus, this Opposition is applicable to them as well.

1 Cir. 1995) (“[a] suit should not be dismissed if it is possible to hypothesize facts,  
 2 consistent with the complaint, that would make out a claim”). The “issue is not  
 3 whether [plaintiff] will ultimately prevail, but whether he is entitled to offer evidence  
 4 to support his claims.” *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir.  
 5 2001). Here, North American has more than sufficiently alleged facts to support all of  
 6 its causes of action.

7 **B. Proposition 103 and California Insurance Code Section 750(d) Provide No**  
 8 **Basis For Dismissal Of North American’s Complaint.**

9  
 10 **1. The legality of commission rebating is immaterial, because North**  
 11 **American properly alleges that Philpot engaged in unlawful conduct.**

12 Philpot premises his entire Motion on the argument that post-Proposition 103,  
 13 commission rebating by insurance agents in California is no longer illegal and he has  
 14 therefore committed no underlying wrong for which he can be held liable. (*See*  
 15 *Opposition at 6-11.*) This argument ignores the allegations in North American’s  
 16 complaint, as well as twisting them beyond recognition. North American’s complaint  
 17 sufficiently and properly alleges wrongful acts beyond simple “commission rebating”.

18 “Commission rebating” involves an insurance agent offering a rebate such that  
 19 the premium paid by the policyholder does not reflect the agent’s commission, and as  
 20 a result, the policyholder pays a lower premium for the policy. North American’s  
 21 clearly alleges something entirely different:

- 22 • Philpot and his agents conceived and perpetuated the Illegal Commission  
 23 Scheme, a sophisticated plot to deceive North American into paying them  
 24 tens of millions of dollars in undeserved and unearned commissions and  
 25 bonuses (Complaint, ¶ 4);
- 26 • The Illegal Commission Scheme involved “offering [] and paying to  
 27 certain complicit individuals, posing as legitimate potential insureds,  
 28 secret rebates and other monetary incentives, including advancing



insurance premiums due North American, in exchange for these individuals applying for [universal life] policies with North American . . .” (Complaint, ¶ 36);

- Further, the Illegal Commission Scheme, as alleged, was underhanded and intended to deceive North American because Philpot’s actions directly contravene the proscription in Distributor Application and Agreements (the “Philpot RM Agreement” and the “Philpot MO Agreement”) in which Philpot agreed that he would “[n]ot to pay any premium personally, or rebate premium to any policyholder,” (Complaint, ¶¶ 20, 27-32);
- Philpot and his fellow agents helped applicants apply for the Sham Policies “without any good faith intention on the part of Defendants or the complicit individuals that the policies would actually be maintained or that applicable premiums would be paid . . .” (Complaint, ¶ 37);
- “[A] single premium [was] paid for each such policy in an amount equal to the minimum premium necessary for Defendants to earn the maximum commission on the policy” but which constituted an amount “insufficient to continue [each] policy in force for more than a few years.” (Complaint, ¶ 38);
- Philpot actively concealed the Illegal Commission Scheme over a period of several years and hundreds of transactions, with the goal of deceiving North American and misleading it as to the true fact of the Sham Policies and larger Illegal Commission Scheme, all done with the intent to induce North American to issue the Sham Policies, pay the undeserved, ill-gotten upfront commissions to Defendants, and causing North American to incur underwriting costs, in reliance thereon. (Complaint, ¶¶ 90-93); and

- Due to Philpot's Illegal Commission Scheme, North American "pa[id] millions in undeserved commissions to the Defendants and bonuses to their uplines, and incurr[ed] underwriting costs thereon, by reason of which North American has suffered millions of dollars in losses. . ." (Complaint, ¶ 95)

North American's allegations of Philpot's conduct go well beyond mere commission rebating. Philpot is alleged, in specific detail, to have perpetrated the Illegal Commission Scheme. Philpot cannot avoid the consequences of his malfeasance simply by cloaking it in the guise of commission rebating because that practice is categorically different from the wrongful acts North American alleges he committed. Nor can Philpot ignore North American's actual allegations, which for the purposes of a 12(b)(6) motion must be assumed to be true. *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998). Thus, because North American properly alleges that Philpot engaged in unlawful conduct supporting North American's claims for unfair competition, breach of contract, bad faith, fraud, negligence, unjust enrichment, violation of RICO, declaratory relief and accounting, the supposed legality of commission rebating offers him no protection, and the Court should deny Philpot's Motion.

**2. Philpot cannot use Proposition 103 as a shield against liability when his wrongful conduct, as alleged in the complaint, contravenes the public policy and intent behind Proposition 103.**

In support of his argument that what North American alleges he did amounted to legal rebating, Philpot grossly misconstrues Proposition 103, claiming that it sanctions his actions. It does not. Proposition 103 was not intended or enacted to protect or encourage the kind of improper acts that North American alleges Philpot and his agents engaged in here. Certainly, nothing in Proposition 103 can be read to

1 sanction false promises by agents to refrain from certain sales activities that the  
 2 insurer chooses to prohibit.

3 As Philpot acknowledges in his Opposition, “[t]he voters of California passed  
 4 Proposition 103 with the express intention to protect consumers from arbitrary  
 5 insurance rates and practices, to encourage a competitive insurance marketplace, to  
 6 provide for an accountable insurance commissioner and *to ensure that insurance is*  
 7 *fair, available and affordable for all Californians.*” (Opposition at 11 (*quoting* Prop.  
 8 § 103, § 2 (“Purpose”)); *see also Calfarms Ins. Co. v. Deukmejian*, 48 Cal. 3d 805,  
 9 812-813 (1989) (the California Supreme Court recognized that “[enormous] increases  
 10 in the cost of insurance have made it both unaffordable and unavailable to millions of  
 11 Californians,” and that Proposition 103’s stated purpose was to ensure that  
 12 “*insurance is fair, available, and affordable for all Californians.*”) (emphasis  
 13 added).)

14 Of course, to the extent that insurance agents’ rebating of commissions lowers  
 15 the cost of insurance for policyholders, it is consistent with the stated purpose of  
 16 Proposition 103. Here, however, North American alleges that Philpot’s scheme  
 17 actually “deprives honest consumers of fairly priced life insurance products by  
 18 transferring the expenses associated with underwriting and issuing such products  
 19 thereby causing honest consumers to pay a higher price for the product than they  
 20 [normally] would have . . .” (Complaint, ¶ 13.) Instead of benefiting the  
 21 policyholders, Philpot’s Illegal Commission Scheme drives up the cost of insurance  
 22 for “honest policy holders who pay sufficient premiums to maintain their policies in  
 23 force and who intend to keep their policies in force.” (*Id.*) This end result directly  
 24 contravenes the public policy behind Proposition 103. (*See* Harvey Rosenfeld, *Auto*  
 25 *Insurance: Crisis and Reform*, 29 U. Mem. L. Rev. 69, 100 (1998) (“[Proposition 103]  
 26 ... sought to impose regulation and create a more competitive and fair marketplace for  
 27 insurance in California.”) (author of the ballot initiative).)  
 28

The purpose behind Proposition 103 *had nothing to do with* allowing insurance agents like Philpot to gain undeserved commissions and bonuses through an insurance policy sales scam, as North American alleges in the Complaint, and drive up the cost of insurance for policyholders. (Complaint, ¶¶ 5, 6, and 13.) Because the clear purpose of Proposition 103 was to foster competition for the benefit of consumers, and to increase the affordability of particular types of insurance for consumers (*Id.*), the pro-consumer, pro-competition Proposition 103 in no way sanctions the malfeasance Philpot is alleged to have perpetrated. In ruling on a 12(b)(6) motion, the court must presume all factual allegations of the pleading are true, and draw all reasonable inferences in favor of the nonmoving party. *Knevelbaard Dairies*, 232 F.3d at 984. Accepting North American's allegations of Philpot's wrongful conduct as true for purposes of this Motion, Proposition 103 is wholly unavailing as a defense to North American's claims, or for legitimizing Philpot's wrongful acts, or for shielding Philpot from liability.

**C. Philpot Expressly Agreed Not To Engage In Rebating And Thus, North American Has Sufficiently Stated Claims For Breach Of Contract (Second Claim for Relief) and Breach of the Covenant of Good Faith and Fair Dealing (Third Claim for Relief).**

Even assuming Proposition 103 permitted the Illegal Commission Scheme alleged by North American (which, as discussed above, it does not), there would still be no basis to dismiss North American's breach of contract claim. There is nothing in Insurance Code Section 750(d) or in Proposition 103 prohibiting contracting parties from agreeing to limit or even prohibit the act of rebating.<sup>3</sup> Accordingly, Philpot's

<sup>3</sup> Notably, the non-precedential Administrative Law Judge opinion Philpot relies on, *In the Matter of Prudential Insurance Company of America, et al.*, acknowledges North American's right to contract against rebating. The Administrative Law Judge determined in that proceeding that "[t]here is nothing in Proposition 103 which states

argument regarding the legality of rebating commissions does not extricate him from his contractual promise to North American that he would not engage in rebating. (Complaint, ¶¶ 20(e), 21(e), 29, 34.)

A plaintiff seeking to recover under a breach of contract theory must allege the existence of an enforceable contract, plaintiff's performance of the contract, the defendant's breach, and resulting damage to the plaintiff. *See Poseidon Dev., Inc. v. Woodland Lane Estates, LLC*, 152 Cal. App. 4th 1106, 1112 (2007). Here, North American alleges that Defendant entered into two binding contracts with North American, the "Philpot RM Agreement" and the "Philpot MO Agreement," in which he agreed (on behalf of himself and the Michael Philpot Agency) that he would "[n]ot pay any premium personally, or rebate premium to any policyholder (Section 3(b))." (Complaint, ¶¶ 20(e) and 21(e)). In violation of his promise, North American alleges that Philpot perpetrated the Illegal Commission Scheme, resulting in significant damages to North American. (Complaint, ¶¶ 48, 65, 82 and 87.) Because North American has adequately alleged a claim for breach of contract based upon Philpot's failure to comply with his contractual promise not to rebate commissions, there is simply no basis for the dismissal of this claim.

In addition, North American has adequately alleged its cause of action for Philpot's breach of the implied covenant of good faith and fair dealing. Philpot argues that North American's claim for the breach of the implied covenant, "... as pled, sounds in tort." (Opposition at 12.) Again, Philpot ignores the complaint's actual allegations. North American alleges that its implied covenant claim is based upon its contracts with Philpot (the "Philpot RM Agreement" and the "Philpot MO

either directly or indirectly that the purpose of repealing section 750 was to allow agents, over the objection of their principal, to discount their charges by rebating . . . [Proposition 103] does not address the elimination of insurer restrictions on commission rebating," and "the practices of [insurers] in refusing to allow their agents to engage in commission rebating and declining to utilize the services of agents who engage in commission rebating do not violate any existing law or established public policy of the State of California." (RJN, Exhibit 2, at 47, 57.)



1 Agreement”), and Philpot’s breach of those contracts. (Complaint, ¶¶ 84 and 85.)  
2 North American alleges that “[i]mplied in the Defendants’ Agreements and the  
3 Philpot Compliance Manual was a covenant by Defendants that they would act in  
4 good faith and deal fairly with North American, act solely for benefit of North  
5 American in matters covered by the Defendants’ Agreements and Philpot’s  
6 Compliance Manual, and to keep North American informed on all matters which may  
7 come to its attention pertaining to the subject matter of the Defendants’ agreements  
8 and Philpot’s Compliance Manual.” (Complaint, ¶ 84.) Further, North American  
9 alleged that “Defendants breached that covenant by failing to deal in good faith with  
10 North American by initiating, participating in and perpetuating the Illegal  
11 Commission Scheme.” (Complaint, ¶ 85.)

12 As the California Supreme Court has observed, “It is universally recognized the  
13 scope of conduct prohibited by the covenant of good faith and fair dealing is  
14 circumscribed by the purposes and express terms of the contract.” *Carma Developers*  
15 *(Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 373 (1992). As North  
16 American alleges, Philpot contracted to “[n]ot pay any premium personally, or rebate  
17 premium to any policyholder (Section 3(b)).” (Complaint, ¶¶ 20(e) and 21(e)). By  
18 perpetrating the Illegal Commission Scheme and signing “complicit individuals” up  
19 for “sham policies,” Philpot acted against the express promises of its contracts with  
20 North American and violated the implied covenant of good faith and fair dealing that  
21 is read into contracts to give meaning to the spirit of the bargain. *Carma*, 2 Cal. 4th at  
22 373 (“The implied covenant is read into agreements to protect the express promises of  
23 the agreement.”).

24 In sum, North American has alleged valid claims for both breach of contract  
25 and for breach of the implied covenant of good faith and fair dealing inherent in the  
26 contracts Philpot breached.



**D. North American's Complaint Alleges Sufficient Facts to Support Its First, Fourth, Six, Seventh, Eighth And Ninth Claims for Relief.**

Philpot contends that because "the alleged illegal rebating of insurance commissions, is legal as a matter of California statutory law," North American's first, fourth,<sup>4</sup> six, seventh, eighth, and ninth claims for relief fail "because they are all based on the same underlying wrong." (Opposition, ¶¶ 11 and 12.) Philpot's reliance on the purported legality of commission rebating again fails. As explained above, the fundamental "wrong" underlying North American's complaint is not the mere rebating of commissions, but rather, the Illegal Commission Scheme, which involves "Defendants' use of secret rebates, unearned discounts, the advancement of premium payments and other financial incentives to complicit applicants for life insurance policies, who never intended to maintain such policies as they were designed or as was required, in order to obtain from North American and other insurance companies unearned commissions and bonuses." (Complaint, ¶ 56.) These allegations are more than sufficient to support North American's claims for unfair competition, fraud, declaratory relief, unjust enrichment and accounting.

**1. North American has pled a valid unfair competition claim.**

North American has adequately pled a violation of the Unfair Competition Law ("UCL") (First Claim for Relief) because California Business and Professions Code section 17200 proscribes "unfair" or "fraudulent" business practices which North American has alleged that the Illegal Commission Scheme constitutes. (Complaint, ¶¶ 56-58.) As the California Supreme Court has held: "The [UCL] does more than just borrow [unlawful acts] . . . Because Business & Professions Code § 17200 is written in the disjunctive, it establishes three varieties of unfair competition – acts or practices

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<sup>4</sup> Because North American has adequately pled its claim for negligence (Fifth Claim for Relief), which Philpot does not contest, there is no need to address the propriety of this claim herein.

1 which are unlawful, or unfair, or fraudulent. In other words, a practice is prohibited as  
 2 'unfair' or 'deceptive' even if not 'unlawful' and vice versa." *Cel-Tech Commc'n,*  
 3 *Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999). Accordingly,  
 4 Philpot's argument that Proposition 103 made commission rebating lawful does not,  
 5 as a matter of law, preclude him from liability under the UCL.

6 **2. North American's fraud claim is proper.**

7 North American has also adequately pled a fraud claim (Fourth Claim for  
 8 Relief) which requires allegations of a (1) misrepresentation, (2) of material fact, (3)  
 9 with knowledge of its falsity, (4) intent to defraud, (5) justifiable reliance, and (6)  
 10 damages resulting from the justifiable reliance. *Stansfield v. Starkey*, 220 Cal. App.  
 11 3d 59, 72-73 (1990). North American alleged that Philpot "failed to reveal and  
 12 suppressed the material fact of the Illegal Commission Scheme which was known to  
 13 Defendants at all times mentioned herein" and that the "failure to disclose and  
 14 suppression of [the] Illegal Commission Scheme was likely to mislead North  
 15 American and did in fact mislead North American in light of Defendants' duty to  
 16 inform North American" into believing that it was fully informed of the "material  
 17 circumstances surrounding" the universal life applications submitted by Philpot and  
 18 his agents. (Complaint, ¶¶ 91-93.) Additionally, North American alleged that "[a]s a  
 19 proximate result of the fraudulent conduct of Defendants . . . North American was  
 20 fraudulently induced into issuing the Sham Policies, paying the underserved  
 21 commissions to the Defendants and bonuses to their uplines, and incurring  
 22 underwriting costs thereon, by reason of which North American has suffered millions  
 23 of dollars in losses." (Complaint, ¶ 95.) On their face, North American's allegations  
 24 state a claim for fraud against Philpot and his confederates.

25 **3. North American alleges a valid declaratory relief claim.**

26 Philpot's assertion that North American seeks, through its lawsuit, a judicial  
 27 determination that its agents are the guarantors of its profits is absurd. (Opposition at  
 28 12.) As the complaint makes plain, North American seeks a judicial declaration

(Eighth Claim for Relief) by this Court that “Defendants are liable for the damages suffered by North American due to the Illegal Commission Scheme.” (Complaint, ¶ 121.) Whether there is “any contractual requirement, or otherwise, requiring Philpot to compel these complicit individuals to maintain their policies for any particular, limited period of time so as to guarantee North American a profit on the sale of its insurance policies,” is a red-herring, one that again tries to sidestep what North American actually alleges in its complaint. North American’s claims have nothing to do with any agent guarantying a profit on each policy. Rather, North American’s claims are grounded in the fraudulent rigging of each insurance transaction from its inception such that each of the Sham Policies would be in force just long enough for Philpot and his cohorts to secure maximum commissions, with the knowledge at the outset that North American would make no profit. (Complaint, ¶ 38.) Indeed, North American would not have issued the Sham Policies had it known of Philpot’s true intentions, and the complaint properly alleges North American’s justifiable, but unfortunate, reliance on Philpot’s misrepresentations. (Complaint, ¶¶ 39, 40, 94.)

**4. North American’s unjust enrichment claim is properly pled.**

North American’s unjust enrichment (Sixth Claim for Relief) and accounting (Ninth Claim for Relief) claims are based on the allegations that Philpot and his agents have unjustly benefited from their Illegal Commission Scheme through the procurement of commissions and bonuses they did not legally earn. (Complaint, ¶¶ 102-104; 122-124.) As a result of Philpot’s wrongful acts, North American seeks a disgorgement of his ill-gotten profits, which cannot be ascertained without an accounting. (*Id.*)

**5. North American alleges a valid RICO claim.**

Lastly, North American has adequately pled a RICO claim (Seventh Claim for Relief) (which is also explained in detail in its RICO Statement, filed on February 13, 2008)). A violation of 18 U.S.C. § 1962(c) requires allegations of: “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.” *Sedima, S.P.R.L. v.*

1 *Imrex Co., Inc.*, 473 U.S. 479, 496 (1985). North American has alleged an ongoing  
 2 pattern of racketeering activity “through Defendants’ use of the Michael Philpot  
 3 Agency enterprise as a mechanism to perpetuate the Illegal Commission Scheme to  
 4 obtain millions of dollars in underserved and unearned commissions and bonuses.”  
 5 (Complaint, ¶ 109.) The conduct involves “offering and paying secret rebates and/or  
 6 unearned discounts and/or advancing premium payments . . . to complicit individuals  
 7 in exchange for such individuals applying for life insurance policies from North  
 8 American . . . without any good faith intention of actually maintaining these policies  
 9 or paying the premiums for them.” (*Id.*) North American also alleges that Philpot  
 10 uses instrumentalities of interstate commerce, “specifically interstate wire and mail,”  
 11 to facilitate racketeering activity. (*Id.*) Because predicate acts that are part of a single  
 12 fraudulent scheme can establish a pattern of racketeering activity (*see United Energy*  
 13 *Owners Comm., Inc. v. U.S. Energy Mgmt. Sys., Inc.*, 837 F.2d 356, 360-61 (9th Cir.  
 14 1988)) and that is precisely what North American has alleged here, no basis exists to  
 15 dismiss North American’s RICO claim.

16  
 17 **E. North American Suffered Significant Damages Due To The Illegal**  
 18 **Commission Scheme, And Adequately Pleads These Damages In Its**  
 19 **Complaint.**

20  
 21 Grasping at straws, Philpot seizes on North American’s allegation that the  
 22 Illegal Commission Scheme and the early lapsing policies it precipitated affected the  
 23 cost of insurance for honest policyholders, and argues that this somehow means that  
 24 North American has not suffered any damages. This claim is patently ridiculous.  
 25 North American suffered significant damages due to Philpot’s Illegal Commission  
 26 Scheme which caused North American to pay millions in commissions to agents who  
 27 were deliberately breaching their promises to North American by selling “free life  
 28 insurance” to policyholders who had no intention of ever paying any premiums and

1 never intended to maintain the coverage past the time covered by the initial premium  
 2 “advanced” by the defendant agents.

3 In any event, the allegations in North American’s complaint must be taken as  
 4 true for purposes of a 12(b)(6) motion to dismiss: (1) North American alleged that it  
 5 lost over \$24 million in commissions and bonuses paid to Defendants and the Michael  
 6 Philpot Agency between 2004 and 2007, in addition to incurring significant  
 7 underwriting costs. (Complaint, ¶¶ 47-50); and (2) North American alleged that it  
 8 paid Defendants and the Michael Philpot agency approximately \$15 million in  
 9 commissions and bonuses for policies currently in-force, that will likely lapse shortly  
 10 in the pattern of past policies born of Philpot’s Illegal Commission Scheme.  
 11 (Complaint, ¶ 50). Philpot’s spurious arguments notwithstanding, North American  
 12 has more than sufficiently stated valid and cognizable claims for relief that will entitle  
 13 it to substantial damages.

14  
 15 **F. Because North American’s Claims Are Neither Vague Or Ambiguous,**  
 16 **Philpot’s Motion For A More Definite Statement Should Be Denied.**  
 17

18 In an apparent “if all else fails” gambit, Philpot has moved for an order  
 19 requiring that North American provide a more definite statement “in support of its  
 20 claims of illegal rebating,” under Rule 12(e). (Opposition at 13.) Specifically, Philpot  
 21 contends that “[t]he parties cannot proceed under the present set of conclusory facts  
 22 and legal conclusions that now exist in the Complaint.” (*Id.*) Like Philpot’s Motion  
 23 to Dismiss, this alternative motion lacks merit and should be denied.

24 A Rule 12(e) motion for more definite statement is only proper where the  
 25 complaint “is so vague or ambiguous that a party cannot reasonably be required to  
 26 frame a responsive pleading[.]” Fed. R. Civ. Proc. Rule 12(e); *Sagan v. Apple*  
 27 *Computer, Inc.*, 874 F. Supp. 1072, 1077 (C.D. Cal. 1994) (Rule 12(e) should be  
 28 denied unless “the complaint is so indefinite that the defendant cannot ascertain the



1 nature of the claim being asserted.”); *see also True v. Am. Honda Motor Co.*, 520 F.  
2 Supp. 2d 1175, 1183 (C.D. Cal. 2007) (denying 12(e) motion where complaint gives  
3 fair notice of the basis for plaintiff’s claims). “Motions for a more definite statement  
4 are viewed with disfavor and are rarely granted because of the minimal pleading  
5 requirements of the Federal Rules. Parties are expected to use discovery, not the  
6 pleadings, to learn the specifics of the claims being asserted.” *Sagan*, 874 F. Supp. 2d  
7 at 1183 (citations omitted). On its face North American’s complaint is neither  
8 unintelligible nor indefinite, and the nature of the North American’s claims against  
9 Philpot is easily ascertained. North American’s allegations regarding Philpot’s  
10 wrongful conduct, and specifically, the facts relating to his participation in the Illegal  
11 Commission Scheme, are set forth in detail. There is simply no valid basis to grant  
12 Philpot’s motion for a more definite statement.

### 13 14 III.

### 15 CONCLUSION

16  
17 As clearly set forth in the complaint, North American alleges that Philpot and  
18 his cohorts perpetuated the Illegal Commission Scheme, offered and paid secret  
19 rebates, advanced premiums and other monetary incentives to complicit individuals  
20 who posed as legitimate consumers and applied for Sham Policies, which were  
21 intended to lapse once Philpot and his agents had unlawfully obtained the maximum  
22 commissions possible. Over a period of years and over hundreds of fraudulent  
23 insurance transactions, Philpot and his associates actively concealed their scheme and  
24 deceived North American into believing that they were actually honoring their  
25 contractual promises not to rebate their commissions in any way. These factual  
26 allegations, assumed to be true for purposes of a 12(b)(6) motion, are more than  
27 sufficient to state valid and cognizable causes of action that will entitle North  
28



1 American to substantial damages, according to proof. Philpot's Motion should be  
2 denied.

3  
4 DATED: July 7, 2008

5 REED SMITH LLP

6 By s/ Miles M. Cooley  
7 Robert D. Phillips, Jr.  
8 Miles M. Cooley  
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REED SMITH LLP  
A limited liability partnership formed in the State of Delaware

**PROOF OF SERVICE**

*North American Company For Life And Health Insurance v. Philpot, et al.*  
**USDC, Southern District Case No. 08 CV 0270 BEN NLS**

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. I am employed in the office of a member of the bar of this court at whose direction the service was made. My business address is REED SMITH LLP, 355 South Grand Avenue, Suite 2900, Los Angeles, CA 90071-1514. On July 7, 2008, I **electronically served** the following document(s) via **CM/ECF** described as:

**PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN  
 OPPOSITION TO DEFENDANT MICHAEL L. PHILPOT'S MOTION  
 TO DISMISS [F.R.C.P. 12(b)(6)] AND MOTION FOR A MORE  
 DEFINITE STATEMENT [F.R.C.P. 12(e)]**



**On the recipients designated on the Transaction Receipt located on the CM/ECF website.**

I declare under penalty of perjury under the laws of the United States that the above is true and correct. Executed on July 7, 2008, at Los Angeles, California.



\_\_\_\_\_  
 Lisa Carpenter